

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CRISTINA GONZALEZ
Claimant

VS.

TYSON FRESH MEATS, INC.
Self-Insured Respondent

)
)
)
)
)
)
)

Docket No. **1,020,529**

ORDER

Claimant requested review of the February 27, 2008 Award by Administrative Law Judge Pamela J. Fuller. The Board heard oral argument on June 10, 2008.

APPEARANCES

Stanley R. Ausemus of Emporia, Kansas, appeared for the claimant. Wendel W. Wurst of Garden City, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The parties were unable to agree on the nature and extent of Cristina Gonzalez's functional impairment due to her work-related injuries. The Administrative Law Judge (ALJ) adopted the opinion of the court ordered independent medical examiner and awarded Gonzalez compensation based upon a 19 percent whole person functional impairment.¹

Gonzalez requests review of the nature and extent of disability. She argues that Dr. Murati's 35 percent whole person functional impairment rating is the most credible and

¹ Gonzalez is no longer working as a result of a personal medical condition and, consequently, did not seek a work disability (a permanent partial general disability greater than the functional impairment rating).

corroborates claimant's testimony. Therefore, claimant's impairment should be increased to 35 percent.

Respondent argues the ALJ's Award should be affirmed.

The sole issue for Board determination is the nature and extent of Gonzalez's functional impairment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The Board finds the ALJ's recitation of the facts are detailed, accurate and supported by the evidence contained in the record. It is not necessary to repeat those fact findings in this Order. The Board approves those fact findings and adopts them as its own.

Highly summarized, Cristina Gonzalez worked approximately 18 years for the respondent. As a result of her job duties she developed pain in her shoulders, arms, wrists, hands and neck. When conservative treatment failed to improve her condition she had additional diagnostic testing performed which revealed a rotator cuff tear. On August 1, 2003, Dr. Alex Neel, performed a surgical subacromial decompression, debridement of rotator cuff tear, debridement of labrum and bicipital tendon on Gonzalez's right shoulder. On January 30, 2004, Dr. Neel performed a surgical subacromial decompression, debridement of subacromial bursa and distal clavicle resection on Gonzalez's left shoulder. Apparently, nerve conduction studies had also revealed mild bilateral carpal tunnel syndrome.

Because of ongoing pain complaints Gonzalez sought additional treatment and was ultimately diagnosed with systemic lupus erythematosus. She continues to receive treatment for this personal condition but it has rendered her unable to work. She is currently receiving Social Security disability benefits.

Gonzalez testified she currently has pain at an 8 level based on a 1-10 scale in both her shoulders, arms, hands and neck. She further testified that she did not have any of these problems before she began working for the respondent. And Gonzalez states her pain started with her work-related injury but she agreed that the doctors would have to tell her whether the pain she now experiences is caused, in part, by her lupus.

During the course of her ongoing treatment for her lupus condition, an additional EMG and nerve conduction study was done on January 17, 2005, which indicated the study was normal and that there was no evidence of carpal tunnel syndrome, polyneuropathy or radiculopathy.

Dr. Neel, who performed the surgeries on Gonzalez's shoulders, provided a rating based upon the AMA *Guides*². The doctor opined Gonzalez had an 8 percent right upper extremity rating for loss of range of motion and a 10 percent right upper extremity rating for mild median nerve entrapment at the wrist. The ratings were combined for a 17 percent rating to the right upper extremity. Dr. Neel assigned the same ratings to Gonzalez's left upper extremity.

Dr. Pedro A. Murati, board certified in independent medical evaluations, electrodiagnosis, physical medicine and rehabilitation, examined Gonzalez on April 21, 2005, at the request of Gonzalez's attorney. Dr. Murati performed a physical examination of Gonzalez and diagnosed her with right shoulder pain S/P subacromial decompression; left shoulder pain S/P subacromial decompression and distal clavicle excision; bilateral carpal tunnel syndrome; myofascial pain syndrome affecting bilateral shoulder girdles extending into cervical and thoracic paraspinals; and probable Lupus. Based upon the AMA *Guides*, the doctor concluded Gonzalez had a 10 percent to the right upper extremity for carpal tunnel syndrome; 3 percent for loss of range of motion to the right shoulder and 10 percent to right upper extremity due to the subacromial decompression. Using the combined value chart, these right upper extremity impairments result in a 21 percent which converts to a 13 percent whole person impairment. For the left carpal tunnel syndrome, Gonzalez has a 10 percent to the left upper extremity; a 4 percent to the left shoulder due to loss of range of motion; 10 percent for the subacromial decompression; and 10 percent to the left upper extremity for the distal clavicle resection. Using the combine value chart, these left upper extremity impairments result in a 29 percent which converts to a 17 percent whole person impairment. Dr. Murati also placed Gonzalez in the Cervicothoracic DRE Category II for a 5 percent whole person impairment due to myofascial pain syndrome. The doctor also placed Gonzalez in the Thoracolumbar DRE Category II due to myofascial pain syndrome affecting the thoracic paraspinals which resulted in a 5 percent whole person impairment. All of the whole person impairments combine for a total of 35 percent. Dr. Murati opined that Gonzalez's injuries were related to her repetitive work at Tyson.

On March 21, 2006, the ALJ ordered an independent medical examination by Dr. C. Reiff Brown to determine Gonzalez's rating and restrictions. Dr. Brown performed a physical examination and diagnosed Gonzalez as having rotator cuff tendonitis and tearing, myofascial pain syndrome involving low cervical, upper thoracic, scapular musculature, and bilateral carpal tunnel syndrome due to her work activities. Dr. Brown noted that although the last EMG study was normal, Gonzalez's physical examination demonstrated ongoing carpal tunnel syndrome which the doctor attributed to Gonzalez's work activities.

² American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Based upon the *AMA Guides*, Dr. Brown rated Gonzalez's bilateral upper extremities at 5 percent to each extremity due to carpal tunnel syndrome; an additional 5 percent to each upper extremity due to loss of range of motion to the shoulders; and a 5 percent to the body as a whole for myofascial pain syndrome. These ratings combine for a 15 percent permanent partial impairment to the body as a whole. Dr. Brown noted that he provided a 5 percent impairment rating for each upper extremity on the basis of carpal tunnel syndrome rather than the usual 10 percent suggested by the *AMA Guides* because of the predisposition that Gonzalez's rheumatologic problems have caused. Dr. Brown, in response to a letter inquiry, added an additional 10 percent rating for Gonzalez's left upper extremity due to the excisional arthroplasty of the left clavicle as part of her surgical subacromial decompression. The doctor converted the additional upper extremity rating to a 5 percent whole person impairment and combined it with his previous rating which results in a 19 percent whole person permanent partial functional impairment.

The sole issue is the extent of Gonzalez's functional impairment. Functional impairment is the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the *AMA Guides to the Evaluation of Permanent Impairment*, if the impairment is contained therein.³ The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.⁴ It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony with the testimony of the claimant and others in making a determination on the issue of disability. The trier of fact must make the ultimate decision as to the nature and extent of injury and is not bound by the medical evidence presented.⁵

In *Bryant*⁶, the Kansas Supreme Court stated the general rule:

If a worker sustains only an injury which is listed in the -510d schedule, he or she cannot receive compensation for a permanent partial general disability under -510e. If, however, the injury is both to a scheduled member and to a nonscheduled portion of the body, compensation should be awarded under -510e.

Because claimant sustained permanent impairment to her neck, which is a nonscheduled injury, all of her injuries, both scheduled and nonscheduled, are to be combined and compensated as a permanent partial disability under K.S.A. 44-510e.

³ K.S.A. 44-510e(a).

⁴ *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

⁵ *Graff v. Trans World Airlines*, 267 Kan. 854, 983 P.2d 258 (1999).

⁶ *Bryant v. Excel*, 239 Kan. 688, 689, 722 P.2d 579 (1986).

The Board agrees with Gonzalez's argument that the opinion of the physician appointed by the ALJ should not be blindly adopted. The physician appointed by the ALJ should, on the other hand, be neutral. This does not always mean the rating is most accurate or credible. In this case, Dr. Brown agreed that Gonzalez's rating for her bilateral carpal tunnel syndrome is 10 percent for each upper extremity according to the *AMA Guides*. But the doctor reduced his rating to 5 percent for each upper extremity because of "the predisposition that her rheumatologic problems have caused."⁷

The Workers Compensation Act provides that compensation awards should be reduced by the amount of preexisting functional impairment when the injury is an aggravation of a preexisting condition. The Act reads:

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.⁸

The Board interprets the above statute to require that a ratable functional impairment must preexist the work-related accident. The statute does not require that the functional impairment was actually rated or that the individual was given formal medical restrictions. But it is critical that the preexisting condition actually constituted an impairment in that it somehow limited the individual's abilities or activities. An unknown, asymptomatic condition that is neither disabling nor ratable under the *AMA Guides* cannot serve as a basis to reduce an award under the above statute.

A physician may appropriately assign a functional impairment rating for a preexisting condition that had not been rated. However, the physician must use the claimant's contemporaneous medical records regarding the prior condition. The medical condition diagnosed in those records and the evidence of the claimant's subsequent activities and treatment must then be the basis of the impairment rating using the appropriate edition of the *AMA Guides*.

As Dr. Brown's reduction of Gonzalez's 5 percent rating for her bilateral carpal tunnel syndrome did not comply with the proper method to establish a percentage deduction for a preexisting condition it will be disregarded and the Board will adopt the opinions of Drs. Neel and Murati (as well as Dr. Brown before his deduction) that Gonzalez suffered a 10 percent functional impairment to each upper extremity for her bilateral carpal tunnel syndrome.

⁷ Dr. Brown's Independent Medical Evaluation report dated May 2, 2006.

⁸ K.S.A. 44-501(c).

Dr. Neel additionally provided Gonzalez an 8 percent functional impairment for loss of range of motion to each shoulder. Accordingly, Dr. Neel's ratings for the left upper extremity include 10 percent for the wrist and 8 percent for the shoulder or a combined 17 percent to the left upper extremity. Dr. Neel provided the same ratings for the right upper extremity. Consequently, Dr. Neel provided a 17 percent rating for Gonzalez's right upper extremity and a 17 percent rating for her left upper extremity.

Dr. Brown provided Gonzalez an additional 5 percent functional impairment for loss of range of motion to each shoulder. And an additional 10 percent to the left upper extremity for the excisional arthroplasty of the left clavicle. Adding in the 10 percent rating for the bilateral carpal tunnel syndrome before 5 percent was inappropriately deducted, Dr. Brown's ratings combine for a 23 percent rating for Gonzalez's left upper extremity. And Dr. Brown's ratings combine for a 15 percent rating for Gonzalez's right upper extremity.

Dr. Murati provided Gonzalez an additional 4 percent for loss of range of motion to the shoulder, 10 percent for the subacromial decompression and 10 percent for the distal clavicle excision. Adding the 10 percent rating for the carpal tunnel syndrome, Dr. Murati's ratings combine for a 29 percent rating for Gonzalez's left upper extremity. Dr. Murati provided an additional 3 percent for loss of range of motion to the right shoulder and 10 percent for the subacromial decompression. Adding the 10 percent rating for the carpal tunnel syndrome, Dr. Murati's ratings combine for a 21 percent rating for Gonzalez's right upper extremity.

In summary, the ratings for Gonzalez's right upper extremity included Dr. Neel's 17 percent; Dr. Brown's 15 percent and Dr. Murati's 21 percent. The ratings for Gonzalez's left upper extremity included Dr. Neel's 17 percent; Dr. Brown's 23 percent and Dr. Murati's 29 percent.⁹ All the doctors recited that their ratings were based upon the *AMA Guides*. In this instance, the evidentiary record fails to persuade the Board that any of the upper extremity ratings are more credible. Consequently, the Board will accord equal weight to all the opinions. Averaging the opinions results in a 23 percent functional impairment to Gonzalez's left upper extremity and an 18 percent functional impairment to the right upper extremity. The 23 percent impairment to the left upper extremity converts to a 14 percent whole person functional impairment. The 18 percent impairment to the right upper extremity converts to an 11 percent whole person functional impairment. The two whole person functional impairments combine for a 23 percent whole person functional impairment.

Drs. Brown and Murati also provided Gonzalez with a 5 percent whole person functional impairment for myofascial pain syndrome to the neck. Dr. Murati added another

⁹ Although the Board is mindful Dr. Brown ultimately rated each wrist at 5 percent, nonetheless, the Board has calculated Dr. Brown's upper extremity ratings by including 10 percent for each wrist because the doctor noted that was the appropriate rating using the *AMA Guides*.

5 percent whole person for myofascial pain syndrome for the thoracic paraspinals. Dr. Brown's rating for myofascial pain syndrome included the low cervical, upper thoracic and scapular musculature whereas Dr. Murati separated the ratings for cervical and thoracic. In this instance the Board again concludes neither rating is more credible and averages the opinions to find Gonzalez has an additional 8 percent whole person functional impairment for myofascial pain syndrome. Combining Gonzalez's 23 percent whole person functional impairment attributable to her bilateral upper extremity impairments with her 8 percent whole person functional impairment attributable to her myofascial pain syndrome the Board finds Gonzalez has suffered a 29 percent whole person functional impairment.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated February 27, 2008, is modified to find Gonzalez has suffered a 29 percent whole person functional impairment.

Claimant is entitled to 120.35 weeks of permanent partial disability compensation at the rate of \$328.70 per week or \$39,559.05 for a 29 percent functional disability, making a total award of \$39,559.05 and ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of July 2008.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The majority awards claimant a 29 percent permanent partial disability to the body as a whole for her injuries. The Kansas Supreme Court in *Casco*¹⁰ emphasized that scheduled injuries are the general rule and nonscheduled injuries are the exception. Accordingly, if an injured body part is on the schedule in K.S.A. 44-510d, then the compensation for that injury must be calculated pursuant to that schedule. The claimant's forearms and shoulders are on the schedule.¹¹ Therefore, any portion of the permanent partial disability awarded by the majority that corresponds to the permanent impairment rating for the forearms and shoulders must be calculated pursuant to K.S.A. 44-510d(a)(13). Neither the neck or back are contained within the schedules of K.S.A. 44-510d. An injury to the neck or back is an unscheduled injury. Accordingly, the portion of the 29 percent permanent partial disability award that corresponds to the neck injury should be calculated pursuant to K.S.A. 44-510e.

Nowhere does K.S.A. 44-510d say that scheduled injuries that occur simultaneously with nonscheduled injuries should be compensated as general body disabilities under K.S.A. 44-510e. By combining the impairment rating for claimant's scheduled injuries to her bilateral wrists and shoulders with the ratings for her unscheduled injuries to her neck or back, the majority is reading something into K.S.A. 44-510d that is not in the statute. *Casco* requires that combinations of scheduled injuries be compensated separately regardless of whether the injuries occurred separately, simultaneously, or as a result of a natural progression. Likewise, K.S.A. 44-510d and K.S.A. 44-510e should be applied separately, such that combinations of scheduled and nonscheduled injuries should be compensated separately.

BOARD MEMBER

BOARD MEMBER

c: Stanley R. Ausemus, Attorney for Claimant
Wendel W. Wurst, Attorney for Respondent
Pamela J. Fuller, Administrative Law Judge

¹⁰ *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, Syl. ¶¶ 7, 10, 154 P.3d 494, rev. denied ___ Kan. ___ (2007).

¹¹ K.S.A. 44-510d(a)(13).